Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

ANDREW GORE,
Petitioner,

versus

TRANSWORLD AIRLINES, a Delaware corporation; THOMAS J. CLOSSICK, an individual; JAMES NASS, an individual; HAROLD SMALLWOOD, an individual; KENNETH GABRIEL, an individual; ROLLIN O. PARKER, an individual,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER CLAIMS ASSERTING THE VIOLATION OF SUBSTANTIVE STATE PROTECTION ARE PREEMPTED BY THE RAILWAY LABOR ACT, 45 U.S.C. SECTIONS 151 ET. SEQ., WHEN THE CLAIMS ARE INDEPENDENT OF THE RELATIVE COLLECTIVE BARGAINING AGREEMENT, RENDERING INTERPRETATION OF THE AGREEMENT UNNECESSARY, AND THE AGREEMENT DOES NOT DETERMINE THE STANDARD BY WHICH THE DEFENDANT'S CONDUCT SHOULD BE JUDGED?

II. IF THE RAILWAY LABOR ACT, 45 U.S.C. SECTIONS 151 ET. SEQ. DOES NOT PREEMPT CLAIMS ARISING FROM STATE RIGHTS WHICH ARE INDEPENDENT OF

THE COLLECTIVE BARGAINING AGREEMENT, DID THE COURT OF APPEALS ERR IN AFFIRMING THE DISTRICT COURT'S DISMISSAL OF GORE'S CLAMS DUE TO PREEMPTION OF THE RAILWAY LABOR ACT?

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The opinion of the United States Court of Appeals for the Eighth Circuit in Gore v. TransWorld Airlines, 210 F.3d 944 (8th Cir.2000), is set forth in the Appendix hereto (App. A). The order of the Eighth Circuit denying petition for rehearing is also set forth in the Appendix hereto (App. B).

BASIS FOR JURISDICTION

The final judgment of the United States Court of Appeals for the Eighth Circuit denying Gore's petition for rehearing en banc was entered on June 30, 2000. (App. A). This petition for writ of certiorari s filed within ninety (90) days from that date. 28 U.S.C. Section 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

RAILWAY LABOR ACT - 45 U.S.C. SECTION 151a (1994)

The purposes of the Act are: (1) to avoid any

interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom or association among employees or any denial as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

RAILWAY LABOR ACT - 45 U.S.C. SECTION 181 (1994)

All of the provisions of subchapter I of this chapter, except section 153 of this title, are extended to and shall cover every common carrier by air...and every air

pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

STATEMENT OF THE CASE

Gore is employed by Trans World Airlines (TWA) as a mechanic at TWA's Maintenance and Engineering facility (the "Overhaul Base") in Kansas City, Missouri. Throughout his employment with TWA, Gore has been a member of the International Association of Machinist and Aerospace Workers, AFL-CIO (the "IAM"). The terms of Gore's employment are subject to a collective bargaining agreement.

Harold Smallwood (Smallwood) is also a mechanic at the Overhaul Base. Thomas J. Clossick (Clossick) is employed by TWA as a Supervisor in the Facilities Maintenance Department at the Overhaul Base and is Gore's

immediate supervisor. Kenneth Gabriel (Gabriel) is also a Supervisor in the Facilities Maintenance Department. James Nass (Nass) is the Manager of the Facilities Maintenance Department and is the immediate supervisor of Clossick and Gabriel. Rollin Parker (Parker) is a retired employee of TWA; prior to his retirement, Parker was a Supervisor in the Facilities Maintenance Department and reported to Nass. These people are mentioned individually because of their respective roles in the events that transpired in December of 1996.

On the evening of Sunday, December 15, 1996, Gore was working at the Overhaul Base. At approximately 9:00 P.M., Gore and co-worker Howard Cowher (Cowher) were on a break in the break room, engaged in a private conversation. Smallwood was in the adjacent room and allegedly overheard a small portion of the conversation between Gore and Cowher. Smallwood, unable to properly discern the context of the conversation, reported Gore's comments to IAM Committeeman Roy Gardner. Smallwood

stated that he believed Gore wished to "take out" some TWA employees between the graveyard and day shift. At 10:00 p.m., Gardner telephoned Clossick and reported Smallwood's allegations.

Clossick, as Gore's immediate supervisor, had informed Gore, approximately two weeks prior to December 15, 1996, that the two of them were going to be "tangling assholes" over a complaint that Gore had made to his supervisor, regarding the privacy of his payroll information.

Clossick traveled to the Overhaul Base to obtain written statements from Smallwood and Cowher concerning the alleged comment made by Gore. Smallwood acknowledged that he had been eavesdropping on the conversation between Cowher and the Gore and repeated what he believed he overheard. Cowher informed Clossick that he was not taking the conversation seriously and believed it to be "B.S.". Clossick failed to conduct any further questioning of Cowher to verify his belief that the subject matter of the conversation was not to be taken seriously, nor

did he inquire as to whether Cowher believed Gore posed a threat to TWA employees.

Clossick requested the prompt intervention of both the KCI Airport Police and TWA security. Five KCI Airport Police officers and three TWA security guards reported to Clossick at the Overhaul Base. TWA, through Clossick, physically detained Gore. Without any independent investigation, the KCI Airport Police handcuffed Gore and conducted a "pat down" search of his person. Clossick and another supervisor interrogated Gore concerning the statements of Cowher and Smallwood. Gore attempted to explain the situation, stating the comment was taken out of context and that no harm was intended towards anyone. In an attempt to elicit consent to search Gore's property, Clossick and Gardner intentionally misinformed Gore that they had the right to conduct searches of his vehicle, locker, lunch box and tool chest. Gore refused to consent to the searches.

Despite Gore's lack of consent, TWA security guards were instructed to search Gore's toolbox, tool chest, locker, lunch box and vehicle. This entire process took place over a two-hour period, during which time Gore was paraded throughout the Overhaul Base while in handcuffs. Upon the conclusion of the searches, Clossick removed Gore's TWA identification badge and placed him on immediate suspension pending a termination hearing.

At approximately 8:00 a.m. the next morning, Nass held a meeting with all the Facilities Maintenance Supervisors and Engineers. During the meeting, Nass explicitly instructed those present to warn fellow employees that Gore was a dangerous individual. Nass's statement was made in reckless disregard to the truth and the foreseeable harm the statement would cause. Thirty-five to forty-five other employees attended a subsequent meeting conducted by Parker and Gabriel. During the course of the second meeting, numerous 8.5 by 11 inch pictures of Gore were posted about the TWA Overhaul Base. Parker and Gabriel warned

employees that Gore was dangerous and to call security if he was seen anywhere on the premises.

The collective bargaining agreement between TWA and its employees, which Gore is party to, requires, among other things, for TWA to protect the safety of its employees and maintain safe working conditions. TWA relies on the duties imposed by the collective bargaining agreement to justify its treatment of Gore on December 15, 1996.

Gore vigorously disputed the truth of the statements made by his supervisors that he was dangerous and posed a threat to his colleagues. While on suspension, Gore submitted to a psychological examination that revealed he posed no threat to his co-workers. The TWA hearing board decided Gore was not a threat and reinstated him with back pay. Due to TWA's conduct, however, Gore found himself ostracized and treated like a pariah upon his return.

Gore initially filed a complaint in federal court against TWA, Clossick, Nass, Smallwood and Parker, asserting a 42 U.S.C. § 1983 violation together with several

claims under Missouri state law. The district court concluded that Defendants were not state actors and did not act under color of state law and declined to exercise supplemental jurisdiction over the remaining state law claims. The case was dismissed, and Gore re-filed the petition in state court, asserting claims of false arrest, negligence, libel and slander, and invasion of privacy for publicly placing him in a false light and public disclosure of private facts. The defendants removed the case to federal court. Gore then filed a motion to remand, which the court denied on February 2, 1999, reasoning that an evaluation of the merit of Gore's claims is tied to a consideration of the terms of the collective bargaining agreement. The court determined that the claims were minor disputes, as defined by the Railway Labor Act (RLA), and were thus preempted by the Act.

On April 26, 1999, the district court granted the defendants' motion to dismiss, on the ground that Gore's claims were preempted by the RLA, without considering the preemption issue. Gore appealed to the Eighth Circuit Court

of Appeals to consider the district court's denial of his motion for remand and the dismissal of his complaint on the grounds of preemption. Gore pointed to the Court's decision in Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246 (1994) to argue that the mere existence of a collective bargaining agreement does not deprive employees of independent remedies under substantive state law. In Norris, the Court explained that the need of a court to refer to the terms and duties contained in a collective bargaining agreement to resolve state law claims does not require preemption.

A panel of the Court of Appeals submitted a 2-1 opinion on April 26, 2000, affirming the district court's dismissal of Gore's claims due to preemption under the RLA. The panel determined that the collective bargaining agreement, rather than Missouri law, defined the duty owed by the defendants in the tort actions brought by Gore. In the opinion of the panel, the essence of Gore's claims are that TWA's conduct was not legally justified, and that interpretation of specific provisions in the collective

bargaining agreement is necessary to determine the validity of Gore's allegations.

Gore subsequently petitioned for a rehearing en banc, arguing that consideration by the full court was necessary to secure and maintain uniformity of decisions in the court, in light of contrary decisions by the Supreme Court of the United States and the United States Court of Appeals for the Eight Circuit. The Court of Appeals, on June 30, 2000, denied Gore's petition for rehearing, 6-5, without giving definitive reasons for doing so.

Gore has duly filed his petition for writ of certiorari within ninety days of the entry of the ruling.

REASONS FOR GRANTING THE WRIT

I. THERE IS CONFUSION AMONG THE CIRCUIT COURTS OF APPEALS REGARDING THIS COURT'S DECISION IN *HAWAIIAN AIRLINES, INC. v. NORRIS* ON THE BREADTH OF THE RAILWAY LABOR ACT'S PREEMPTIVE POWER, WHICH IS YIELDING INCONSISTENT AND UNPREDICTABLE RESULTS IN THE CIRCUIT COURTS.

In Norris, this Court decided whether certain claims are subject to the RLA. Norris, 512 U.S. at 261. The threshold question is decided against preemption if the employee's claims turns on a "purely factual question" concerning conduct that does not require a separate interpretation of the CBA, even if the question could also be resolved under the terms of the CBA. Id. In Norris, Norris' claim could potentially be resolved in one of two ways: (1) by interpreting the meaning of just cause under the CBA, or (2) by examining Hawaiian Airlines' motive in discharging

Norris. Id. The first form of the claim is preempted by the RLA, whereas the second form is not. Confusion surrounds RLA preemption, as reflected in the conflicting decisions among the circuit courts of appeals. The main problem stems from courts' basing their preemption decisions on a classification that is itself being challenged by the disputing parties.

Some courts, applying Norris, have provided some guidance as to what constitutes "interpretation" of a CBA. One approach is for the court to analyze state law claims and the defenses asserted for each such claim, and determine whether either requires interpretation under the CBA. See Gay v. Carlson, 60 F.3d. 83 (2nd Cir. 1995); Ferrell v. Cross, 543 N.W.2d 111 (Minn App. 1996). For example, in Ferrell v. Cross, the Plaintiff, a operations planner assistant for Northwest Airlines sued her supervisor for tortious interference with contractual rights, intentional infliction of emotional distress and defamation. Ferrell, 543 N.W.2d 111, 113 (Minn App. 1996). The defendant asserted that the

plaintiff's claims were preempted by the RLA, as the CBA and rules of conduct that were in place needed to be interpreted to determine whether defendant's actions were justified. Ferrell, 543 N.W.2d at 114. The court, applying the Norris decision, expressly rejected the defendant's argument. Id. "The [defendant's] motives, whether they acted on reasonable or probable cause, and whether either [defendant] acted with actual malice are purely factual determinations that do not require a court to interpret the CBA." Id. The court reasoned that a plaintiff's right to be free from defamation exists independently of the CBA , as does the defendant's duty not to defame; although the CBA may be referred to in connection with an asserted defense, the CBA does not define state substantive law. Id. The court of appeals, therefore, held that the plaintiff's defamation claim was not preempted by the RLA. Id. The United States Court of Appeals for the Second Circuit has used a similar analysis, and has applied it to a set of facts markedly similar to Gore's. Harold Gay, a Pan Am airline pilot, sued his co-workers in

the United State District Court for multiple causes of action, including defamation. Gay v. Carlson, 60 F.3d 83 (2nd Cir. 1995). Gay alleged that his co-workers falsely reported that Carlson permitted a flight attendant to control the plane. Gay, 60 F.3d at 85. The co-workers' allegations led to Gay's discharge, although he was later reinstated with full back pay and seniority rights. Id. The District Court concluded that the Employee Rules of Conduct and the CBA had to be consulted to determine whether the defendants enjoyed a qualified privilege in reporting Gay's misconduct, and further held that the CBA was relevant in determining whether defendants were "justified" in their actions. Id.

The Second Circuit, applying the decision in Norris, reversed. The Second Circuit held that no interpretation of the CBA was required to resolve Gay's state law claims of defamation and prima facie tort, and that state law provides the exclusive source of the rights. Id. Further, the court expressly rejected the district court's finding that the CBA required interpretation to determine if the defendants

enjoyed a qualified privilege and were "justified" in their actions. Id. "Whether or not a qualified privilege defense applies...can be determined solely according to New York law, and no interpretation of the collective bargaining agreement is necessary to make the determination. The privilege is independent of the agreement. Although the court may consult the Rules of Conduct, these rules in no way determine whether the plaintiff should nevertheless prevail." Id. at 89. The court also rejected defendants' argument concerning the justification of their actions, explaining that Norris teaches that reference to the CBA in connection with a justification defense does not give rise to preemption. Id. at 88.

Other circuits have relied upon similar analyses. In Ertie v. Continental Airlines, Inc., former flight attendants brought a state court action against the airline for breach of contract and fraudulent concealment. Ertie v. Continental Airlines, Inc., 136 F.3d 690, 692 (10th Cir. 1998). The plaintiffs, in Ertie, claimed that the rights they sought to

vindicate did not arise from the CBA they were party to, while the airline contended that resolution of the plaintiff's claims could not be resolved without interpretation of the CBA. Ertie, 136 F.3d at 694. The court concluded that the RLA, via the terms of the CBA, preempted the breach of contract claim, but not the fraudulent concealment claim. Id. at 695.

On a similar set of facts, however, the Ninth Circuit decided that former airline employees' claims were necessarily minor disputes, and thus preempted by the RLA and the terms of the CBA. Fennessy v. Southwest Airlines, 91 F.3d 1359, 1362 (9th Cir. 1996). In Fennessy, the court conceded that preemption analysis depended in part on how the claim was framed. Id. at 1361. As other courts have noted, Norris has encouraged the emergence of the 'artfully crafted' pleading, constructed solely to avoid preemption. See Maher v. New Jersey Transit Rail Operations, 593 A.2d 750, 757 (N.J. 1991); Hubbard v. United Airlines, Inc., 927 F.2d 1094 (9th Cir. 1991).

Another uneven result is illustrated by the following comparison. A federal district court in Minnesota held that a plaintiff's disability discrimination claim involved a minor dispute committed exclusively to resolution under the RLA. Hogan v. Northwest Airlines, Inc., 880 F.Supp. 685 (D. Minn. 1995). Under a comparable set of facts, though, the Eighth Circuit came to a wholly opposite result, determining that an employee's state law discrimination claim against an airline was not preempted by the RLA. Taggart v. Trans World Airlines, 40 F.3d 269, 275 (8th Cir. 1994).

The conflicting opinions among the circuits caused by a misunderstanding of Norris has led to uncertainty and uneven results for plaintiffs and defendants alike. Clarification of the breadth of the RLA's preemption power would allow for uniformity in the federal appellate system.

II. THE DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS CONCERNING THE BREADTH OF THE RAILWAY LABOR ACT'S PREEMPTIVE

POWER IS CONTRARY TO ITS OWN JURISPRUDENCE, AND IS CONTRARY, AS WELL, TO THE DECISIONS OF THIS COURT.

In Hawaiian Airlines, Inc. v. Norris, this Court acknowledged that the RLA's mechanism for resolving minor disputes does not preempt causes of action to enforce rights that are independent of a collective bargaining agreement. Norris, 512 U.S. at 256. Although Petitioner Hawaiian Airlines argued for a broad interpretation of what constitutes minor disputes within the context of the RLA (and thus the invocation of the RLA's preemptive power), this Court could not find in the legislative history of the RLA any Congressional intent that would justify such broad preemptive reach. Id. at 255. Congressional intent is the touchstone of the complete preemption analysis. Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 65 (1987). The Court's rationale was that despite the need for uniformity and predictability in labor law, the substantive protections

guaranteed to workers by state law cannot be usurped by the procedural apparatus of the RLA. Norris, 512 U.S. at 257.

The dispositive issue Norris was the source of the right that Norris claimed Hawaiian Airlines violated. Id. In that case, while a collective bargaining agreement (CBA) may have addressed wrongful discharge, Norris' claim was based strictly on Hawaii law prohibiting discharge in retaliation for whistleblowing. Id. The Court applied the same preemption analysis with respect to state claims arising out of state law as it did in Atchison, Topeka and Santa Fe Railway v. Buell, 480 U.S. 557 (1987), in which the independent right asserted arose under federal law. Norris, 512 U.S. at 257. In Norris, the Court relied upon the preemption standard from the Labor Management Relations Act, to wit: a state law cause of action is not preempted by the RLA if it involves rights and obligations that exist independent of the CBA. Id. at 258. Moreover, despite the possibility of overlap, an independent state claim will survive preemption if analysis of the claim does not require

interpretation of the CBA. Id. at 261-63.

The Court reaffirmed the threshold test identified in Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399, 405-06, (1988), that preemption is improper when the claim in independent of the CBA. Norris, 512 U.S. at 261. A dispute is independent if it may be resolved through purely factual questions. Id.

The United States Court of Appeals for the Eighth Circuit has followed the same line of reasoning. See Hanks v. General Motors Corp., 906 F.2d 341, 343 (8th Cir. 1990); Luecke v. Schnucks Markets, Inc., 85 F.3d 356, 359 (8th Cir. 1996). In deciding whether claims are preempted, some courts have taken a broad view of what it means for a case to be substantially dependant upon an interpretation of a collective bargaining agreement, and have considered defenses based on the collective bargaining agreement. See, e.g., Johnson v. Anheuser Busch, Inc., 876 F.2d 620, 623 (8th Cir. 1989).

On the other hand, a separate line of Eighth Circuit

cases hold that claims based on state law that are intimately related to events at the work place are not preempted as long as they involve purely factual questions and are not based on provisions of the collective bargaining agreement. Luecke, 85 F.3d at 359. No express or implied provision of a CBA guides a factual inquiry into whether TWA made statements about Gore that were false, damaging and negligent. See Id. At 360. The fact that TWA defends the claims using the rationale that its conduct was justified by the terms of the CBA is not enough to create a basis for preemption. See, e.g., Humphrey v. Sequentia, Inc., 58 F.3d 1238, 1244 (8th Cir. 1995), in which an employer's assertion that there was "just cause" for a discharge under the CBA's terms, was held not to create a basis for Labor Management Relations Act preemption. The Eighth Circuit has held that an examination of an employer's conduct and motives does not require an interpretation of the collective bargaining agreement. Traggart v. Trans World Airlines, Inc., 40 F.3d at 273, quoting Norris, 512 U.S. at 262.

Gore's claims rest not upon the collective bargaining agreement, but upon a charge that TWA violated state substantive law, and there can be no doubt that the claims were within the jurisdiction of the district court, rather than the adjustment board. See, generally, Fenessy 91 F.3d at 1364.

III. STATE LAW HAS CREATED THE TORT ACTIONS GORE IS BRINGING, AND IS THE DEFINING SOURCE OF THE DUTIES SPECIFICALLY OWED BY TWA FOR EACH CLAIM ASSERTED.

The panel decision of the Eight Circuit Court of Appeals correctly enunciates the basis of Gore's claims, setting forth, respectively, the elements of his claims of false imprisonment, libel and slander, negligence, and public disclosure of private facts. (App. A) The panel correctly states that Missouri law has created these tort actions, but mistakenly contends that the CBA alone defines the duties

owed by TWA for each claim asserted. Id. at 949. While TWA may point to its obligations under the CBA to defend its conduct, the claims themselves are not inherently tied to any provision of the CBA. Meyer v. Schnucks Markets, Inc.,163 F.3d 1048, 1051.

As Justice Douglas reasoned in Andrews v. Louisville & Nashville Railroad, 406 U.S. 320 (1972), one who joins a union does not abandon his right to substantive state protection. Andrews, 406 U.S. at 330. The CBA does compel TWA to protect its employees from harm; TWA nevertheless has an obligation not to violate Gore's state law rights. For example, TWA could handcuff Gore and lock him in a closet for a week at the Overhaul Base, and proceed to argue that its conduct was justified in light of its duty to protects its other employees. If the logic of the panel decision of the Eighth Circuit in the instant case were applied to the hypothetical situation, Gore's claims would again have to be preempted by the RLA, due to the connection between TWA's defense and the duty imposed by the CBA. Absurd

as it may be, it is nonetheless the result produced by the court's rationale, and its understanding of Norris.

The specific duty TWA owed to Gore, in relation to Gore's tort claims, is clearly deducible through analysis of the ample Missouri case law on the subject. As in Norris, the CBA is not the "only source" of the rights Gore asserts in his state law claims. Norris, 512 U.S. at 258. In his dissenting opinion in the Eighth Circuit panel decision, Judge Heaney argues that whether Gore was libeled or slandered can be answered by determining whether TWA made a defamatory false statement against him, published it with the requisite intent, and in so doing damaged him; the same reasoning applies to Gore's negligence and privacy claims. (App. A)

CONCLUSION

For all of the reasons identified herein, a writ of certiorari should issue to review the panel decision of the United States Court of Appeals for the Eighth Circuit and,

ultimately, to vacate and reverse its decision and remand the matter to state court for trial.

Respectfully Submitted,

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APPENDIX A

United States Court of Appeals,

Eighth Circuit.

Andrew L. GORE, Appellant,

v.

TRANS WORLD AIRLINES, a Delaware corporation; Thomas J. Clossick; James Nass; Harold Smallwood; Kenneth Gabriel; Rollin O. Parker, Appellees.

No. 99-2363.

Submitted Dec. 16, 1999.

Filed April 26, 2000.

Rehearing and Rehearing En Banc Denied June 30, 2000.

Chief Judge Wollman, Judge McMillian, Judge Richard S. Arnold, Judge Morris Sheppard Arnold, and Judge Bye would grant the petition

Affirmed.

Heaney, Circuit Judge, dissented and filed opinion.

Before BEAM, HEANEY, and HANSEN, Circuit Judges.

HANSEN, Circuit Judge.

Andrew Gore appeals the district court's dismissal of his case due to preemption under the Railway Labor Act (RLA), 45 U.S.C. §§ 151- 163, 181-188 (1994 & Supp. II 1996). We affirm.

I.

Andrew Gore is employed as a mechanic by Trans World Airlines (TWA) at its Maintenance and Engineering Center, also known as the Overhaul Base, in Kansas City, Missouri. He is a member of the International Association of Machinist and Aerospace Workers, AFL-CIO and the terms of his employment are subject to a collective bargaining agreement.

On the evening of December 15, 1996, Gore was working at the Overhaul Base. While he and coworker Howard Cowher were on a break, another coworker, Harold

Smallwood, allegedly overheard Gore telling Cowher that he planned to kill himself as well as other TWA employees. Smallwood reported the comments to union steward Roy Gardner, who in turn reported the comments by telephone to Thomas Clossick, a supervisor in the Facilities Maintenance Department at the Overhaul Base. Clossick telephoned the report to James Nass, who is the Manager of the Facilities Maintenance Department and Clossick's immediate supervisor. Nass consulted with Paul Davis, who is TWA's Employee Relations Manager. Nass then instructed Clossick to get written statements from the coworkers as to Gore's statements and if necessary to call the police.

After reading the coworkers' statements, Clossick called the Kansas City International Airport Police. Gore asserted that Smallwood had not heard the entire conversation and had taken Gore's statements out of context. The police handcuffed Gore and patted him down searching for weapons. They requested permission to search his locker, tool chest, tool box, lunch box, and vehicle. Gore initially

denied consent, but after consulting with union stewards, Gore consented to the search of his vehicle and locker. Supervisor Clossick required Gore to turn in his TWA identification badge and parking pass, and he suspended Gore pending a termination hearing.

The following morning, Rollin Parker, a supervisor in the Facilities Maintenance Department at that time, informed his crew members of the occurrence, warned them not to allow Gore onto the premises, and instructed them to call the guard house if Gore attempted to return to the Overhaul Base. Nass held a supervisors' meeting with Parker and Kenneth Gabriel and told them to warn their employees that Gore was a dangerous man. Gore's identification badge photograph was enlarged and posted in various places at the Overhaul Base to enable TWA employees to recognize Gore.

The collective bargaining agreement includes a management rights clause, pursuant to which TWA issued Rules of Conduct and Personnel Regulations, providing in pertinent part that violence, threatening other employees, and

firearms are prohibited from the premises and that the company reserves the right to make inspections of employee lockers, desks, lunch boxes, vehicles, and other items of personal property located on the premises when there is reason to believe they may contain prohibited items. Also, the collective bargaining agreement imposes contractual obligations on TWA to protect the safety of its employees. The agreement requires TWA to maintain safe working conditions and to promptly handle complaints involving the safety of working conditions. (See J.A. at 179.) The defendants claim to have acted in accordance with the duties imposed by the collective bargaining agreement.

Gore disputed the truth of the statements made by supervisors advising employees that Gore was dangerous or posed a threat to TWA employees. While on suspension, Gore submitted to a psychological examination which demonstrated that he posed no threat to TWA personnel. Thereafter, the TWA hearing board decided that Gore did not pose a threat and reinstated him with back pay.

Gore filed a complaint in federal court against TWA, Clossick, Nass, Smallwood, and Parker, asserting a 42 U.S.C. § 1983 violation along with several state-law claims. The district court granted summary judgment in favor of TWA and Clossick on the § 1983 claim, concluding that they were not state actors and did not act under color of state law. Having thus disposed of the only federal law claim, the district court declined to exercise supplemental jurisdiction over the remaining state-law claims. This court affirmed the dismissal for lack of a state actor. See Gore v. Trans World Airlines, 163 F.3d 602 (8th Cir.1998) (unpublished).

Gore then filed an amended complaint in state court, asserting claims of false arrest, negligence, libel and slander, and invasion of privacy for publicly placing him in a false light and public disclosure of private facts. The defendants removed the case to federal district court. Gore filed a motion to remand, which the district court denied upon concluding that "the evaluation of whether the Plaintiff's claims have merit is inextricably intertwined with

consideration of terms in the [collective bargaining agreement]." Noting that the resolution of Gore's claims will require an analysis of both his rights and the defendants' duties under the collective bargaining agreement, the district court determined that the claims are minor disputes preempted by the RLA.

The district court then granted the defendants' motion to dismiss, citing its previous determination that the claims are preempted by the RLA and refusing to reconsider the preemption issue. Gore now appeals the district court's denial of his motion for remand and the dismissal of his complaint on grounds of preemption.

II.

We review the district court's denial of a motion to remand and its dismissal of the complaint on grounds of preemption under a de novo standard. See Schuver v. MidAmerican Energy Co., 154 F.3d 795, 798 (8th Cir.1998); Taggart v. Trans World Airlines, Inc., 40 F.3d 269, 272 (8th Cir.1994).

A defendant may remove a state court claim to federal court only if the claim originally could have been filed in federal court, and the well-pleaded complaint rule provides that a federal question must be presented on the face of the properly pleaded complaint to invoke federal court jurisdiction. Caterpillar Inc. v. Williams, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). A defendant is not permitted to inject a federal question into an otherwise state-law claim and thereby transform the action into one arising under federal law. See id. "Congress has long since decided that federal defenses do not provide a basis for removal." Id. at 399, 107 S.Ct. 2425. "Thus, a case may not be removed to federal court on the basis of a federal defense, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case." Rivet v. Regions Bank of Louisiana, 522 U.S. 470, 475, 118 S.Ct. 921, 139 L.Ed.2d 912 (1998) (internal quotations and alterations omitted). To permit removal on the basis of a federal defense would deprive the

plaintiff of the right to be the master of his cause of action. See Caterpillar Inc., 482 U.S. at 399, 107 S.Ct. 2425.

An independent corollary to the well-pleaded complaint rule is known as the complete preemption doctrine. Id. at 393, 107 S.Ct. 2425. The complete preemption doctrine converts an ordinary state-law claim into a federal claim where "the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.' " Id. (quoting Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 65, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987)). Whether federal law preempts a state-law cause of action is a question of congressional intent. Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 252, 114 S.Ct. 2239, 129 L.Ed.2d 203 (1994).

"Congress' purpose in passing the RLA was to promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes." Id. Under the RLA, parties are obligated to arbitrate minor

disputes, which are controversies arising out of the application or interpretation of the collective bargaining agreement, and therefore, complete preemption applies to disputes involving duties and rights created or defined by the collective bargaining agreement. See Id. at 256-59, 114 S.Ct. 2239. Claims of preemption under the RLA are governed by a standard that is "virtually identical" to that employed under § 301 of the Labor and Management Relations Act (LMRA), 29 U.S.C. § 185; under this standard, "a state-law cause of action is not pre-empted by the RLA if it involves rights and obligations that exist independent of the [collective bargaining agreement]." Norris, 512 U.S. at 260, 114 S.Ct. 2239.

"[W]here the resolution of a state law claim depends on an interpretation of the [collective bargaining agreement], the claim is pre- empted." Id. at 261, 114 S.Ct. 2239 (discussing favorably the analysis set forth in Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 108 S.Ct. 1877, 100 L.Ed.2d410 (1988)). However, " 'purely factual questions'

about an employee's conduct or an employer's conduct and motives do not 'requir[e] a court to interpret any term of a collective-bargaining agreement.' " Id. (quoting Lingle, 486 U.S. at 407, 108 S.Ct. 1877) (alteration in original). Also, a mere need to reference or consult a collective bargaining agreement during the course of state court litigation does not require preemption. See Id. at 261 n. 8, 108 S.Ct. 1877. Our preemption analysis focuses on a determination of whether the state-law claim "confers nonnegotiable state-law rights on employers or employees independent of any right established by contract, or, instead, whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract." Allis- Chalmers Corp. v. Lueck, 471 U.S. 202, 213, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985) (cited favorably in Norris, 512 U.S. at 260-61, 114 S.Ct. 2239); see Taggart, 40 F.3d at 272 (noting that "the critical question is one of characterization--does the state law claim involve interpretation or application of the collective bargaining agreement").

In this case, the district court concluded that Gore's state-law claims are preempted because they are inextricably intertwined with a consideration or interpretation of the collective bargaining agreement. Gore asserts that his state-law claims exist independent of the collective bargaining agreement and are not preempted. Our review of Missouri law, however, convinces us that the rights asserted in Gore's tort suit are not nonnegotiable, independent state- law rights. Instead, the facts of this tort suit make it "inextricably intertwined with consideration of the terms of the labor contract." Allis- Chalmers Corp., 471 U.S. at 213, 105 S.Ct. 1904.

Gore's complaint alleges claims of false arrest, negligence, libel and slander, and invasion of privacy (both by placing Gore in a false light and by disclosing private facts). While state law has created these tort actions, the collective bargaining agreement is the defining source of the duties specifically owed by the defendants for each claim asserted. "The essence of the cause of action of false arrest,

or false imprisonment, 'is the confinement, without legal justification, by the wrongdoer of the person wronged.' " Rustici v. Weidemeyer, 673 S.W.2d 762, 767 (Mo.1984) (en banc) (quoting Warrem v. Parrish, 436 S.W.2d 670, 672 (Mo.1969)). To prevail on this claim, the plaintiff bears the burden to demonstrate that the defendants' actions were done "without legal justification." Gore's complaint pleads this essential element generically, avoiding any mention of the relative rights and duties contained within the collective bargaining agreement. The defendants have indicated that their actions were required according to their interpretation of specific provisions in the collective bargaining agreement.

While we are mindful that removal cannot be invoked on the basis of facts not alleged in the complaint, see Caterpillar Inc., 482 U.S. at 397, 107 S.Ct. 2425, we are also constrained by the artful pleading doctrine--the principle that "a plaintiff may not defeat removal by omitting to plead necessary federal questions." Rivet, 522 U.S. at 475, 118 S.Ct. 921 (internal quotations omitted). When a plaintiff has

artfully pleaded in a manner that avoids an element of the tort that rests on federal law, the court "may uphold removal even though no federal question appears on the face of the plaintiff's complaint." Id.; see also Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 397 n. 2, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981) (quoting a treatise stating that courts will not permit artful pleading to close off a defendant's right to a federal forum and will seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization).

While Gore's complaint avoids mention of the collective bargaining agreement, it indicates that the actions took place in the course and scope of the defendants' employment with TWA, a relationship in fact governed by a collective bargaining agreement that specifically requires TWA to provide a safe working environment and to promptly investigate and handle complaints relating to worker safety. Employers and employees are free to negotiate what actions an employer may take to preserve the safety and security of

the workplace and the safety of other employees. Given the fact that Gore's alleged statements caused a serious security concern in the workplace, Gore's burden to prove that he was falsely arrested without legal justification will necessarily require an interpretation of the collective bargaining agreement to determine whether the defendants acted contrary to their duties under the agreement. Thus, this claim is not based on an independent state-law right but is inextricably intertwined with the provisions of the collective bargaining agreement. Therefore, the claim is preempted.

Likewise, Gore's libel and slander claims will require the court to construe whether the defendants' actions conformed to the rights and duties created under the collective bargaining agreement. "The elements of defamation in Missouri are: 1) publication, 2) of a defamatory statement, 3) that identifies the plaintiff, 4) that is false, 5) that is published with the requisite degree of fault, and 6) damages the plaintiff's reputation." Overcast v. Billings Mut. Ins. Co., 11 S.W.3d 62, 70 (Mo.2000) (en

banc). The element requiring a showing that the statement was published with the requisite degree of fault will need to be evaluated within the framework of the contract terms governing the standard by which TWA must handle employee safety complaints. The defendants assert that their actions were required by specific provisions of the collective bargaining agreement. Again, artful pleading has avoided the fact that the collective bargaining agreement is inextricably intertwined with the resolution of this dispute.

The same can be said about Gore's claim of negligence. In the circumstances presented in this case, where simple negligence is claimed in the manner in which TWA employees (acting within the course and scope of their employment) investigated a claim of a threat to other employees, the collective bargaining agreement is the source of the duty of care owed. The duty allegedly breached is defined by the agreement that governs the employment relationship. See Allis-Chalmers Corp., 471 U.S. at 216, 105 S.Ct. 1904 (noting that preemption applies if the extent of the

duty ultimately depends upon the terms of the agreement between the parties). When the collective bargaining contract is the source of the duty allegedly breached, application of the tort remedy is preempted. See Lingle, 486 U.S. at 405 & n. 4, 108 S.Ct. 1877..

Finally, Gore claims violations of his right to privacy because TWA employees published private facts and placed him in a false light. These state-law torts require a showing that the other party unreasonably obtained private information or that the disclosure would be highly offensive to a reasonable person. See St. Anthony's Med. Ctr. v. H.S.H., 974 S.W.2d 606, 610 (Mo.Ct.App.1998) (stating the elements of the tort of publishing private facts); Sullivan v. Pulitzer Broad. Co., 709 S.W.2d 475, 478 n. 5 (Mo.1986) (en banc) (stating the elements of placing another in a false light). The duties owed and the reasonableness of the parties' actions in these circumstances cannot be evaluated independently from the bargained-for terms of the collective bargaining agreement. The extent of the plaintiff's privacy rights in this

matter were legally negotiated by the terms of the collective bargaining agreement, and therefore, the resolution of these tort claims is inextricably intertwined with an interpretation of the rights and duties created by the collective bargaining agreement.

Gore contends that his claims are purely factual, that the collective bargaining agreement need only be referenced during the state court litigation (not interpreted), and that justification defenses grounded in rights and duties created by the collective bargaining agreement do not give rise to preemption, citing Norris and Meyer v. Schnucks Markets, Inc., 163 F.3d 1048 (8th Cir.1998). We disagree. Gore's claims are not purely factual but are rooted in an interpretation of the collective bargaining agreement. We do not hold that removal and preemption may be based on a federal defense. Instead, we have concluded that Gore cannot be successful on the claims he has pleaded in this factual situation without interpreting certain terms of the collective bargaining agreement that govern the rights and duties of the

parties. Additionally, we find the facts of Norris and Meyer distinguishable from the facts at hand.

In Norris, the plaintiff alleged that he was discharged in violation of state public policy and the state whistle-blower protection law. The Court held that these claims are not preempted because they are grounded in independently created state-law rights involving purely factual questions. See 512 U.S. at 266, 114 S.Ct. 2239. To the contrary, for Gore to prove the elements of the torts he alleged in this case, he will be required to argue the meaning of standards or duties created and defined by the governing collective bargaining agreement. Because the collective bargaining agreement provides the source of the duties allegedly breached or governs the determination of reasonableness under the state law, the resolution of Gore's tort claims will require more than a mere tangential reference to the collective bargaining agreement, even though Gore's complaint omits any reference to the collective bargaining agreement. The Court in Norris expressly recognized that

"where the resolution of a state-law claim depends on an interpretation of the [collective bargaining agreement], the claim is preempted." 512 U.S. at 261, 114 S.Ct. 2239.

In the same manner, the Meyer case from our court is distinguishable. In Meyer, we held that Meyer's state-law claims of slander, tortious interference with a business relationship, and retaliatory transfer were not preempted by the LMRA. The facts, however, are far different from Gore's case. In Meyer, the plaintiff alleged that in retaliation for his criticism of his employer's improper sanitation procedures in handling meat, the company allowed supervisors to harass him and criticize him publicly. 163 F.3d at 1049. We stated that complete preemption occurs when the plaintiff's claim "require[s] the interpretation of some specific provision of a [collective bargaining agreement]." Id. at 1051. We concluded, however, that the causes of action alleged in that particular context were neither based on nor substantially dependent upon an interpretation of the collective bargaining agreement. Id. (also noting that although the facts of the

complaint occurred while the plaintiff was on the job, "the claims themselves are not inherently tied to any provision of the relevant [collective bargaining agreement]").

To the contrary, Gore asserts facts that occurred while the defendants were seeking to respond, according to their duties under the collective bargaining agreement, to a perceived security threat to many employees. The defendants have set forth specific provisions of the collective bargaining agreement that they contend governed their actions and prescribed their duties in this factual scenario. Gore cannot establish liability on his tort claims without demonstrating that the defendants' actions were wrongful under a proper interpretation of the relevant rights and duties bargained for in the collective bargaining agreement.

III.

Accordingly, we affirm the judgment of the district court.

HEANEY, Circuit Judge, dissenting.

The majority opinion is inconsistent with the United States Supreme Court's decision in Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 114 S.Ct. 2239, 129 L.Ed.2d 203 (1994), and with the decisions of this circuit in Taggart v. Trans World Airlines, Inc., 40 F.3d 269 (8th Cir.1994), Luecke v. Schnucks Mkts., Inc., 85 F.3d 356 (8th Cir.1996), and Meyer v. Schnucks Mkts., Inc., 163 F.3d 1048 (8th Cir.1998), and for that reason, I respectfully dissent.

Justice Blackmun, writing for the Court in Norris, reviewed the scope of federal preemption under the RLA in a case involving a state law claim brought by an aircraft mechanic alleging he was discharged for refusing to certify a plane that he considered unsafe and for reporting his safety concerns to the FAA. The Court held that Norris's state law claim was not preempted even though he also could seek redress through the RLA's arbitral mechanism. The Court stated that "no proposed interpretation [of the RLA] demonstrates a clear and manifest congressional purpose to create a regime that broadly pre-empts substantive

protections extended by the States, independent of any negotiated labor agreement." Norris, 512 U.S. at 255-56, 114 S.Ct. 2239.

Here, the majority recognizes, and I agree, that the state of Missouri has created tort actions for false arrest, negligence, libel and slander, and invasion of privacy, both by placing Gore in a false light and by disclosing private acts. I part company with the majority, however, in its conclusion that the collective bargaining agreement is the defining source of the duties specifically owed by TWA to Gore. Here, as in Norris, the collective bargaining agreement is not the "only source" of the rights that Gore asserts in his state law claims. See Id. at 258, 114 S.Ct. 2239. Wholly apart from the collective bargaining agreement, TWA had an obligation not to violate Gore's state law rights. The parties' obligation under the RLA to arbitrate disputes arising out of the application or interpretation of the collective bargaining agreement does not relieve the company of this duty, nor does it deprive an employee of his opportunity to bring a state

law action for damages. See id. Here, as in Norris, we have purely factual questions about an employee's conduct, the employer's response to that conduct, and its motives for so responding.

The majority's argument that resorting to the collective bargaining agreement is necessary to determine where state statutes have been violated is foreclosed by the Supreme Court's decisions in Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988), and in Norris, holding that the issue of whether an employer's action establishes the elements of a claim under state law is purely a factual question. Norris 's impact on the jurisprudence relating to an employee's right to bring a state law action in RLA cases is illustrated by the pre- and post-Norris decisions in the Fifth Circuit case of Hirras v. National R.R. Passenger Corp., 10 F.3d 1142, cert. granted and judgment vacated, 512 U.S. 1231, 114 S.Ct. 2732, 129 L.Ed.2d 855 (1994). There Hirras asserted, inter alia, a state law claim for intentional infliction of emotional distress

based on verbal abuse by coworkers, abusive telephone calls from unknown sources, and offensive graffiti. The district court held that the claim was preempted by the RLA; the Fifth Circuit affirmed. On certiorari, the Supreme Court vacated the decision and remanded to the Fifth Circuit for reconsideration in light of Norris. On remand, the Fifth Circuit rejected the employer's argument that a state law claim for intentional infliction of emotional distress arises out of the collective bargaining agreement because the agreement determines the standard by which the employer's conduct is judged. See Hirras v. National R.R. Passenger Corp., 44 F.3d 278 (5th Cir.1995). The similarity between Hirras and this case should dictate the same result, one which the majority eschews.

I thought that this court settled the questions raised here in the two Schnucks cases. In Luecke v. Schnucks Mkts., Inc., 85 F.3d 356 (8th Cir.1996), an employee brought an action for defamation against his employer, Schnucks Markets, alleging that the employer told others that he

refused to take a drug test. Schnucks argued that resolving the defamation claim depended on an analysis of the collective bargaining agreement's clauses regarding management rights and establishing a grievance procedure. We held that the claim was not preempted because the issue could be determined based on whether the employee took the drug test, whether the company's statement that he refused was false, and whether it was made with malice. Similarly, here the questions to be answered are whether Gore was confined without legal justification, and whether Gore was libeled or slandered. The first question can be answered without reference to the collective bargaining agreement. Either the employer was justified or it was not. Although TWA's justification defense may be based on the collective bargaining agreement, the agreement would at most be consulted, and not interpreted. Whether Gore was libeled or slandered can be answered by determining whether TWA made a defamatory false statement about Gore, published it with the requisite intent, and in so doing damaged Gore, all

questions that can be answered without interpreting the collective bargaining agreement. This reasoning applies equally to the privacy and negligence claims.

In Meyer v. Schnucks Mkts., Inc., 163 F.3d 1048 (8th Cir.1998), John Meyer, a meat cutter, brought a state law action for slander, intentional infliction of emotional distress, and other claims. Schnucks removed the case to federal court alleging preemption. The district court held some claims were preempted; others were not. It then granted summary judgment on the non- preempted claims. Our court reversed, holding that none of the plaintiff's claims were preempted. We stated:

> Although the events underlying Mr. Meyer's complaint occurred on the job, the claims themselves are not inherently tied to any provision of the relevant CBA. To prove slander, Mr. Meyer will have to produce evidence that Mr. Jansen made false statements that injured Mr. Meyer's reputation. The elements of tortious interference with a business relationship are the existence of a contract

> or of a valid business expectancy known to the defendant, intentional and unjustified interference causing a breach of the contract, and damages. Except for the existence of the valid business expectancy itself, which can be demonstrated by mere reference to the CBA without any analysis of it, neither of these causes of action is based on, or substantially dependent upon an interpretation of, the CBA. Therefore, neither of them is automatically preempted by the LMRA. For similar reasons, we see nothing in the basic elements of the other claims that requires analysis of the CBA for their resolution. Id. at 1051.

Similarly, any inquiry in this case into the collective bargaining agreement merely would require its consultation, and not interpretation of it. Accordingly, Gore's claims are not be preempted.

For the reasons outlined above, I have no alternative but to dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 99-2363WMKC

Andrew L. Gore,	) Order Denying Petition for
	) Rehearing and for Rehearing
	) En Banc
Appellant,	)
vs.	)
Trans World Airlines, etc.,	)
et al.,	)
Appellees.	)

The petition for rehearing en banc is denied. Chief Judge Wollman, Judge McMillian, Judge Richard S. Arnold, Judge Morris Sheppard Arnold, and Judge Bye would grant the petition.

The petition for rehearing by the panel is also denied.

(5193-010199)

June 30, 2000

Order Entered at the Director of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit